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In The
Supreme Court of The United States
October Term 1998

CURTIS McDONALD and
ALICE MARIE JOHNSON
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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1-088

QUESTIONS PRESENTED

1. Did the government violate 18 U.S.C. Section 201(c)(2) by offering leniency to cooperating accomplices who testified at trial; does 18 U.S.C. Section 201(c)(2) apply to the government, considering the statute broadly defines the word "whoever;" was the Sixth Circuit Court's failure to apply the statute to the government a direct contravention of this Court's holding in *Nardone v. United States*, 302 U.S. 379 (1937); and does the application of the statute to everyone except the government constitute a violation of equal protection under Fifth Amendment Due Process?

2. Was the failure of the Trial Judge to recuse a violation of Fifth Amendment Due Process?

PARTIES TO THE PROCEEDING

The Petitioner Curtis McDonald is an individual formerly residing in Memphis, Tennessee, now incarcerated for life as a result of this conviction and in custody in a federal institution.

The Petitioner Alice Marie Johnson is an individual formerly residing in Memphis, Tennessee, now incarcerated for life as a result of this conviction and in custody in a federal institution.

Respondent is the United States Government.

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Petitioners, Curtis McDonald and Alice Marie Johnson, petition for a writ of certiorari to review the March 1, 1999, Opinion of the United States Court of Appeals for the Sixth Circuit which affirmed the judgment entered by the United States District Court for the Western District of Tennessee entered in the District Court as a result of a jury verdict finding each guilty of conspiracy and other crimes. Curtis McDonald was sentenced to life imprisonment under the Guidelines. Alice Marie Johnson was also sentenced to life imprisonment under the Guidelines.

OPINION BELOW

The Opinion of the Sixth Circuit in *United States v. Curtis McDonald, Alice Johnson, Jerlean McNeil, Marcus Lopez, and Milton Valencia*, March 1, 1999, was not reported.

JURISDICTION

The Sixth Circuit Court of Appeals entered its judgment in *United States v. Curtis McDonald, Alice Johnson, Jerlean McNeil, Marcus Lopez, and Milton Valencia*, *supra*, on March 1, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). Since this appeal involves an issue which is virtually identical to an issue in *United States v. Ware*, 161 F.3d 414 (6th Cir. 1998), *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998),

and *United States v. Haese*, 162 F.3d 359 (5th Cir. 1998), this petition brings to the attention of this Court those decisions but distinguishes the facts in those cases as the facts herein are even more outrageous. See *infra*.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

18 United States Code, Section 201 (Appendix D) is relevant to this petition. It states in pertinent part:

> Section 201. Bribery of public officials and witnesses
>
> (c) Whoever...
>
> (2) directly or indirectly, gives, offers of promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom, shall be fined under this title or imprisoned for not more than two years, or both.

Also relevant is the Fifth Amendment Due Process Clause. See Appendix C.

STATEMENT OF THE CASE

The district court had jurisdiction over this case pursuant to 18 U.S.C. Section 3231, which provides that "[t]he district courts of the United States shall have original jurisdiction ... of all offenses against the law of the United States." Petitioner Curtis McDonald and Petitioner Alice Johnson and others were convicted in 1997 by a jury of conspiracy to possess with the intent to distribute cocaine, in violation of 21 U.S.C. Section 846 and 841(a)(1). Curtis McDonald received a term of life imprisonment. Alice Marie Johnson also received a term of life imprisonment. Each filed an appeal to the Sixth Circuit, raising numerous issues. During the pendency of the appeal, the Tenth Circuit issued *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998). A three judge panel held that 18 U.S.C. § 201(c)(2) applied to government prosecutors, and suppressed the statements of a witness who had entered into an agreement with the government to testify in exchange for leniency. Because of the ruling of *Singleton*, *supra*, the Petitioners in the present case sought permission in the Sixth Circuit to supplement briefs and raise the issue, since cooperating accomplice-government witnesses testified against them. A motion to supplement original briefs was filed and the Sixth Circuit granted the motion by Order filed August 11, 1998. Oral argument was heard and the Sixth Circuit then issued its opinion on March 1, 1999 (Appendix A), sustaining the

government's argument that 18 U.S.C. § 201(c)(2) does not apply to any agreement entered into by the government with a testifying witness in exchange for a promise of leniency and also ruling against Petitioners as to all of the other issues. Petition for Rehearing and Suggestion for Rehearing En Banc was filed and denied April 13, 1999. Appendix B.

ARGUMENT
REASONS FOR GRANTING THIS PETITION

FIRST ISSUE
VIOLATION OF 18 U.S.C. § 201(c)2)

Under Rule 10, this petition should be granted since it presents an important question of statutory interpretation that concerns all district and circuit courts and involves the most important question in federal criminal law today. Despite the en banc reversal of *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998) AND THE HOLDING OF *United States v. Haese*, 162 F.3d 359 (5th Cir. 1998) and *United States v. Ware*, 161 F.3d 414 (6th Cir. 1998), Petitioner insists that the *contra* view that this statute indeed applies to government attorneys or agents [of *United States v. Fraguela*, 1998 WL 560352 (E.D. La. 8-27-98) and *United States v. Lowery*, 1998 (WL 493818 (S.D. Fla. 1998)] is the better view. Indeed, the facts herein are more outrageous than in *Singleton*, *Ware*, or *Haese*. We know of no reported case

where the accomplice testimony of cooperating criminals is so untrustworthy.

This decision of the Sixth Circuit below against ignores the plain language of 18 U.S.C. § 201(c)(2): the federal anti-bribery statute is designed to prevent *all parties or entities* from exchanging leniency for testimony at trial or hearing!! Petitioner submits the Sixth Circuit has also rendered a decision that is contrary with a decision of this Court; and has so far departed from the usual and customary interpretation of the anti-gratuity statute, that it creates one set of rules for government attorneys, and one set of rules for the remainder of the federal bar.!!

THE LONG HABIT

Thomas Paine, sparkplug of the American Revolution, said it best in 1776: "the long habit of doing something wrong gives it the superficial appearance of being right." Consider the holding of *Haese* (Fifth Circuit) *supra*, at pp.366-368, which we say violates this sacred concept:

> Section 201(c)(2) prohibits the giving, offering or promising anything of value to a witness for or because of his testimony. Haese relies upon *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998) *reh'g en banc granted, opinion vacated* (10th Cir. July 10, 1998). In *Singleton*, the court found that the prosecutor violated § 201(c)(2) and reversed

> the defendant's conviction based upon an accomplice's testimony at trial under a cooperation agreement. *Id.* at 1359-61. The accomplice agreed to testify truthfully in return for leniency, including the possibility of a 5K1.1 motion by the government. *Id.* at 1344. This Circuit, however, has rejected the applicability of the *Singleton* court's holding. *United States v. Webster*, 162 F.3d 308, 356-58 (5th Cir. 1998). "[T]his circuit's precedents shows ... that we consistently have upheld government efforts to provide benefits to witnesses in exchange for testimony... ." *Id.* In addition, no other jurisdiction has adopted *Singleton*, and even the Tenth Circuit vacated the decision pending rehearing *en banc*.

This Circuit, once again, refuses to adopt *Singleton*'s reasoning and holding. This Court has stated that "no practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence." *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987), *cert. denied*, 484 U.S. 1026, 108 S.Ct. 749, 98 L.Ed.2d 762 (1988). The First Circuit has correctly noted that frequently the most knowledgeable witnesses available to testify about criminal

activity are other co-conspirators. *United States v. Daily*, 759 F.2d 192, 196 (1st Cir. 1985); see *United States v. Reid*, 19 F.Supp.2d 534, 537 (E.D. Va. 1998). Often, there are situations where these individuals are the only credible witnesses, and without the ability to use their testimony the government would not be able to obtain a conviction. *Id.* Moreover, this essential "right on the part of the prosecutor to make promises of leniency in exchange for testimony is as old as the institution of the criminal trial." *Id.* In addition, affording leniency to cooperating accomplices dates back to the common law of England and has been recognized and approved by the United States Congress, the United States Courts and the United States Sentencing Commission. *United States v. Barbaro*, 1998 WL 556152 at n3 (S.D.N.Y. Sept. 1, 1998); see also *United States v. Laureano*, 1998 WL 696006 at n1 (S.D.N.Y. Oct. 7, 1998).

Unlike the *Singleton* court, it is evident to this Court that Congress did not intend for section 201(c)(2) to be used when prosecutors offer lenity for a witness' truthful testimony. To interpret section 201(c)(2) in any other way would apply shackles to the government in its pursuit to enforce the law. See *United States v. Hammer*, 25 F.Supp.2d 518, 535-36 (M.D.Pa. 1998) (noting that the *Singleton* opinion makes a criminal out of nearly every federal prosecutor, accomplices out of district judges, suppresses highly relevant evidence and cripples the enforcement of federal criminal law).

Two courts have followed *Singleton*'s flawed rationale, *United States v. Fraguela*, 1998 WL 560352, at n2 (E.D.La. Aug. 27, 1998) (concluding that section 201(c)(2) "does and should apply to prosecution plea bargaining") *United States v. Lowery*, 15 F.Supp.2d 1348, 1359-60 (S.D. Fla.1998) (finding that suppression of co-defendant's testimony is the appropriate remedy for a violation of section 201(c)(2) and to deter unlawful prosecutorial conduct). These courts are incorrect and this Circuit will not follow down a path that will throw our criminal system into disarray.

Although *Fraguela* and *Lowery* were misguided by the *Singleton* court, numerous courts dealing with the application of section 201(c)(2) have refused to accept its rationale. To apply section 201(c)(2) to the government in this case is "unsound, not to mention nonsensical, especially in its creation ex nihilo of an exclusionary rule barring testimony from virtually every cooperating federal witness. *Eisenhardt*, 10 F.Supp.2d at 521. Therefore, we must reject Haese's contention that 18 U.S.C. § 201(c)(2) is violated when testimony is obtained in exchange for a favorable plea agreement. Thus, we hold that the district court did not err in allowing Assomull's testimony. (footnotes omitted).

This practice is wrong -- dead wrong -- and criminal. "The long habit" does not make it *right* or *lawful*.

The Sixth Circuit Court of Appeals Decision Is In Conflict With This Court's Statutory Interpretation Jurisprudence

This Court has consistently noted that the task of analyzing a statute must begin with its plain language. "The starting point in interpreting a statute is its language, for '[i]f the intent of Congress is clear, that is the end of the matter.'" *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 409 (1993) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)). "Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) (internal quotation marks omitted); see also *Estate of Cowart v. Nicklos Drilling Company*, 505 U.S. 469, 476 (1992) (referring to "the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written").

In the present case, Congress has clearly provided that the anti-gratuity statute found in 18 U.S.C. § 201(c)(2) apply to everyone, including government attorneys charged with upholding the laws and other interests of the United States, when the statute begins by saying "[w]hoever" to define the perimeters of its audience. Petitioner submits nothing could be clearer and that the plain language used by Congress

shows an intent to apply the statute to *all* persons including the government.

Clearly, the maxim *noscitur a sociis*, "that a word is known by the company it keeps," *Gustafson v. Alloyd Company, Inc.*, 115 S.Ct. 1061, 1069 (1995), shows that the meaning of the word "whoever" should not be limited in regard to its application to prosecutors, and certainly not limited any from the accompanying language in 18 U.S.C. § 201(c)(2). In other words, and contrary to the Circuit Court holdings of *Ware*, *Singleton*, and *Haese*, *supra*, there is nothing in the statute which shows any intention by Congress to exempt federal prosecutors from the prohibitions of the Act.

Likewise, when the statute states that "whoever .. gives, offers, or promises anything of value," Congress is sufficiently specific in its meaning to encompass the promise of leniency or favors that have become so prevalent in our judicial system when the government seeks to compel the testimony of witnesses. In plain language: words mean something! If that is so, then the plain meaning of 18 U.S.C. § 201(c)(2) clearly springs forth to include government prosecutors, however well intentioned they might be, or desirous to ferret out crime in society. There is absolutely nothing unambiguous about the statute in question. As stated many years ago by Thomas Paine, "The long habit of doing something wrong gives it the superficial appearance of being right."

In this case, the Petitioners were found guilty along with others of conspiracy and possession with intent to distribute cocaine. Each petitioner was sentenced to life imprisonment based upon the lies and fabrication of cooperating accomplices induced to lie by violation of 18 U.S.C. § 201(c)(2).

THE PROOF BELOW BEFORE THE JURY

The proof of the government was mainly "cooperating" individuals or informants who ordinarily come in three varieties: (1) anonymous, (2) the citizen, and (3) the criminal milieu. In this case, the source was from the criminal milieu and these, indeed, are persons who are likely to lie and should be presumed unreliable: "It is to be expected that the criminal informer will not infrequently reach for shadowy leads, or even seek to incriminate the innocent." *Jones v. United States*, 266 F.2d 924, 928 (D.C. Cir. 1959) The informer, indeed, has always been associated with tyranny and despotism. Despised in free societies, the informer is the human embodiment of the fear of the iron fist. Free societies treasure privacy, personal loyalty, and the sense of community that flows from loyalty and privacy. In the totalitarian state, there is a war on privacy and the only loyalty permitted is loyalty to the totalitarian state either as a political entity or as a cult of personalities centered around the dictator. Governments, at war with their citizens, acting as always in the name of some socially desirable ends, value

order and stability without regard to the cost of achieving these goals. In the "war against drugs," the informer is just as despised, and should be eyed with suspicion by appellate judges. Indeed, some persons refuse to cooperate with the government due to moral conviction that it is wrong to cooperate and blame others for individual conduct and mistakes regardless of the situation -- and the fact that society is losing the "war against crime."

> Criminals are likely to say or do almost anything to get what they want, especially when what they want is to get out of trouble with the law. It is my personal firsthand experience of over 18 years as a prosecutor, this willingness to do anything, includes... lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies, and double-crossing anyone with whom they come in contact, including -- and especially -- the prosecutor.
>
> Stephen Trott, Assistant Attorney General for the Justice Department (1984)

THE PARADE OF LIARS

"The Truth, The Whole Truth, So Help Me God"

• Merrick Bill Thomas	
• Milton Valencia	
• Jose Alicano	"Scarface"
• Ramon Ramirez	"Fabian"
• Paul Duventre	"The Preacher"
• Garcerial Dotson	"Ted"
• Edward Williams	"Moses"
• Felix Cohens	
• Michael Barnes	
• Kelvin Willis	The Lawyer
• Andre Johnson	"Babe Bro"
• Marcellia Jaramillo	
• Maurice Mondie	
• Marcos Lopez	"Rambo"
• Luis Alberto Gonzalez	"Mike"
• Victoriano Minotta	"Leo"

The government, as stated, relied primarily upon the testimony of numerous "cooperating individuals," names and aliases above [better named "cooperating criminals"] or informants which the defense brands "liars". Each "cooperating individual" had a strong motive to lie: escape punishment. Each faced life in prison -- if the truth were

known. Not one single cooperating individual had any credibility and the government "dangled the carrot" and shook the keys to the prison door, saying, want the door opened? Incriminate! And they did. These were cooperating accomplices that would do anything for reward -- lie, cheat, deceive, kill![1]

More than ten percent of all cases decided since the Federal Sentencing Guidelines became effective have seen a departure for substantial assistance with approximately one-in-five offenders securing such treatment for their cooperation during the last three fiscal years. Fitzgerald[2] *Informant Law Deskbook* (1996). This, of course, does not include "cooperation" in 1997 and 1998. It is suspected that most of these plea bargains violated the witness-tampering statute! [18 U.S.C. § 201(c)(2)] This "bribery" should be halted.

> Common sense would suggest that [an accused accomplice] often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still

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1. Government witness Andre Johnson testified that he would in fact kill for $100,000 by hiring someone else to actually "pull the trigger". See TR, TRIAL, Johnson, 10-9-96, Vol. XI, p.2399-2400; APX v.4, p.1516.

2. Fitzgerald is a retired DEA special agent and a former sergeant in the Miami, Florida, police force and is also Associate Director and co-founder of the National Institute for Drug Enforcement Training.

> awaiting his own trial or sentencing. To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility that one might expect to find in the public at large.

Washington v. Texas, 388 U.S. 14, 22-23 (1967)

"Accomplice plea agreements tend to produce unreliable testimony because they create an incentive for the accomplice to shift blame to the defendant or other co-conspirators. Further, an accomplice may wish to please the prosecutor to ensure lenient prosecution in his own case." *Singleton*, *supra*, *dissent*, at p.9 (quoting *Accomplice Testimony Under Contingent Plea Agreements*, 72 Cornell L.Rev. 800, 802 (1987).

The testimony of the witnesses was crucial to the government's case, and essential in its conviction of the Petitioners. The testimony of these criminal witnesses was the government's only direct link between Petitioner and a purported large supplier of cocaine. But for their testimony, the government's proof that the Petitioners were a major recipient of cocaine was simply reduced to long distance telephone records, hotel bills, and airline receipts. Petitioner submits that had these witnesses been barred from testifying, or the jury informed that the offer of lenience by the

government constituted a separate and indictable criminal offense by the government, then no rational jury would have found them guilty beyond a reasonable doubt.

Does the Circuit Court's Holding Conflict With This Court's Decision In *Nardone v. United States*, 302 U.S. 379 (1937), Concerning Whether 18 U.S.C. § 201(c)(2) Applies To The Government?

The Sixth Circuit cited in its *Ware* opinion, *supra* [cited as authority against Petitioner in the Opinion denying her relief], this Court's decision of *Nardone v. United States*, 302 U.S. 379 (1937), holding that the canons of statutory interpretation express clearly that 18 U.S.C. § 201(c)(2) does not apply to the government attorneys. But the holding expressed in *Nardone*, *supra*, establishes that a criminal statute such as that in the present case should apply to the government, unless Congress specifically exempts it from the language!

In *Nardone*, *supra*, the Court was asked to determine if the provisions of Section 605 of the Communications Act of 1934 applied to the government, who had attempted to use unauthorized intercepted telephone conversations at trial. The district court allowed the testimony, and the circuit court affirmed the conviction. A conviction under the Act was punishable by fine or imprisonment. *Nardone*, at 381.

> The Act provided in part:
> [N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; ...

Nardone v. United States, 302 U.S. at 381.

"Taken at face value the phrase 'no person' comprehend federal agents, and the ban on communication to 'any person' bars testimony to the content of an intercepted message." *Nardone, supra*, at 381. "...[T]he plain words of 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that '*no person*' shall divulge or publish the message or its substance to '*any person*'." Nardone, at 382 (emphasis in original). *It seems without question that the phrase "whoever" in 18 U.S.C. § 201(c)(2) deserves the same analysis and plain-meaning interpretations as was afforded in Nardone.*

The Sixth Circuit took great liberties with *Nardone* to justify excluding 18 U.S.C. § 201(c)(2) from governmental application, paraphrasing how it 'would deprive the sovereign of a recognized or established prerogative title or interest,' or simply that application on the government would "create an obvious absurdity." *United States v. Ware*, 161 F.3d at 419

(quoting *Nardone*, *supra*, at 383-384). *Nardone* gave examples of situations where statutes would not apply to the government, although none are applicable to 18 U.S.C. § 201(c)(2).[3]

It seems folly to urge, as did the government in *Ware*, that an Assistant United States Attorney is not an agent of the federal government, but somehow converted to a higher plane wherein he is a reflection of the sovereign. *Id.* at 421. "The rule of exclusion of the sovereign is less stringently applied where the operation of the law is upon the agents or servants of the government rather than on the sovereign." *Nardone*, at 383. The answer to this is no further than the plain rationale of *Nardone*, where the Court recognized and accepted that the government attorney was subject to the statutory proscriptions.

The government also argued in *Ware* that 18 U.S.C. § 201(c)(2) simply does not apply to the government because to do so would impede one of the "principal benefits" in the area of prosecution. "The answer is that the question is one of policy. Congress may have thought it less important that some offenders should go unwhipped of justice than that officers would resort to methods deemed inconsistent with

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3. Nardone gave the "classical instance" of how the state is exempt from operation of the general statutes of limitations. It also emphasized how laws designed to prevent speeding do not apply to the police or fire department during an emergency. Id. at 383-384.

ethical standards and destructive of personal liberty." *Nardone*, at 383.

Did the Circuit Court's Refusal To Apply The Plain Meaning Of 18 U.S.C. § 201(c)(2) To The Government Constitute A Violation Of Equal Protection Under The Due Process Clause?

The government attorneys are subject to the same constraints as are imposed on others subject to the equal protection component of the Due Process Clause of the Fifth Amendment. See, *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). The Attorney General and United States Attorneys retain "broad discretion" to enforce the nation's criminal laws. *Wayte v. United States*, 470 U.S. 598 (1985) (quoting *United States v. Goodwin*, 457 U.S. 368, 380, n.11 (1982)). They have this latitude because they are designated by statute as the president's delegates to help him discharge his constitutional responsibility to "take care that the Laws be faithfully executed." *U.S. Const.*, Art. II, Section 3; also see, 28 U.S.C. § § 516, 547. However, the duties, functions and discretionary powers imposed on a government prosecutor are indeed "subject to constitutional constraints." *United States v. Batchelder*, 442 U.S. 114, 125 (1979).

The Circuit Court's holding creates the unworkable and unjust situation wherein the government attorneys are

operating under one set of rules in dealing with the federal criminal code, while the remainder of the federal bar is required to follow another set of rules, namely, that they cease from offering "anything of value" to a witness in exchange for his testimony, or risk the imposition of criminal fines or sanctions.

"Constitution law manifests another vital legal tradition which the government's position undercuts -- the policy of ensuring a level playing field between the government and defendant in a criminal case. The Supreme Court long ago recognized that impartiality in criminal cases requires that '[b]etween [the accused] and the state the scales are to be evenly held.'" *United States v. Singleton*, *supra*, dissent, pp.12-13, *supra*, (quoting *Hayes v. Missouri*, 120 U.S. 68, 70 (1887)). The central inquiry and constitutional requirement in any criminal case is whether the "trials are fair." *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Petitioner submits that the Sixth Circuit's decision in refusing to apply 18 U.S.C. § 201(c)(2) to the case created an *imbalance* of such constitutional proportion that this Court should on this ground alone grant the petition for certiorari.

RULES OF PROFESSIONAL ETHICS

Another argument recognized by *Singleton*, *supra*, of the Tenth Circuit and other cases is that federal prosecutors as lawyers are bound by state ethics rules in the states where they engage in their duties. State ethics rules function like

rules of criminal procedure: federal prosecutors are ethically barred from obtaining testimony from cooperating accomplices and others by promises of leniency and such testimony is tainted and "inadmissible". See now vacated panel decision in *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998) (This argument will be expanded in the brief if this petition is granted.)

SECOND ISSUE
FAILURE TO RECUSE
VIOLATION OF FIFTH AMENDMENT DUE PROCESS

On the morning of the first day of trial, the defendant Alice Johnson (petitioner) realized for the first time that the trial judge's husband was in the law firm that had represented her on several civil matters and to which law firm Alice Johnson had paid considerable money as fees. Defense counsel raised the issue because of the perception of defendant Johnson that such was inappropriate. Quite naturally, her perception and fears were realized in her own mind by the results of this case and the rulings complained of in this brief. Since the emphasis on this issue and others like it is dual - *reality* and *perception of reality* - we submit the Court's ruling was wrong and under the circumstances violates Fifth Amendment Due Process. Until very recent years, criminal lawyers routinely represented more than one client, if there was no *apparent* conflict. Now, it is never done. Judges react in horror and quite properly so to the

appearance of impropriety, and argue with great fervor that each client has the right to counsel and though the lawyers *veracity*, *good intentions*, and *honor* are not questioned, the *appearance* of impropriety rules the day. That's the *goose*. This is the *gander*. It's the same *sauce*.

The Petitioner Johnson will go to her grave (somewhere in a federal prison if this case stands) believing with her last breath that she didn't get a fair shot. The remedy was easy and painless on the first day of trial.

DISQUALIFICATION OF THE TRIAL JUDGE

The trial judge should have disqualified herself before the trial based on the information that her husband's law firm (not he personally) represented in an unrelated civil matter the alleged co-conspirator Alice Johnson (petitioner herein).

A lawyer is bound by ethical considerations in his role as advocate. The judge is bound to act ethically in her role as judge. But the rules pertaining to judicial conduct are different from those pertaining to the conduct of lawyers as advocates. Our adversary system presents two advocates representing clients whose interests have come into conflict. The duty of each is to present her client's case in the strongest light possible, to win, using every legitimate legal method to convince the fact-finder that her client should prevail. DR 7-101

The importance of an impartial and competent "referee" between the two parties is obvious: The Judge must

ensure that the lawyers in their advocacy, do not step beyond what is legally ~~or~~ ethically permissible. Without the presence of an unbiased and competent judge performing this function, one party could gain an unfair advantage. Further, to the extent that the judge has cause to favor one side over the other due to personal interests or biases (rather than the merits of the case), the legitimacy of the entire adversary system is undermined. Even when the judge is not the trier of fact, the slightest hint of bias or prejudgment on her part might unfairly affect the outcome because of the great influence she has with the jury, and the perception is as important as reality, especially the perception of the defendant.

The rules and principles believed to be necessary to promote proper judicial conduct are delineated in the ABA Code of Judicial Conduct [CJC] (adopted in all federal and a number of state courts) and in state and federal statutory provisions.

Under English common law, a judge could be disqualified only if he had a direct pecuniary interest in the outcome of the case. By the twentieth century the situations in which recusal would be justified were broadened to include a "substantial" interest, even if not pecuniary.

Today, under 28 U.S.C. § 455, self-recusal is recognized by the judge and a judge has an affirmative duty to recuse herself if she falls within its purview. It may also be asserted by an accused by motion in the trial court.

Recusal is specifically mandated under Section 455 when a judge individually or a member of her family has a financial interest in the case that would be substantially affected by the outcome of the trial. Recusal is also mandated when a judge or her spouse ... has an interest that could be substantially affected by the outcome of the trial. The failure to recuse constitutes a violation of the due precess right of the accused. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986)

Under § 455 a judge is required to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The standard is based on circumstances as they would appear to the "ubiquitous reasonable person": once the appearance of unfairness or partiality arises, the judge should recuse himself regardless of his personal view concerning his impartiality.

The appearance of impropriety is a basis for disqualification. Not only must the temple of justice be pure, but it must also appear to be pure, and that appearance extends to defendants and the public as well as lawyers and judges. In 1990 a new Code of Judicial Conduct [CJC] was adopted by the ABA to replace the 1972 Code. Canon 2 of the CJA "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."

We submit that Her Honor should have recused herself pretrial when confronted with the information that her husband's law firm was representing the accused co-conspirator Alice Johnson in an unrelated civil case. As a

matter of avoiding the appearance of impropriety and for due process purposes, her disqualification was essential.

Immediately upon finding out about the possible conflict, counsel for the defendant called it to the attention of the Court at sidebar and requested a hearing which was not granted.

CONCLUSION

For the reasons stated above, the Court should grant this petition and issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Nos. 97-5339, 97-5556, 97-5338, 97-5187, 97-5196

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CURTIS MCDONALD, ALICE JOHNSON, JERLEAN MCNEIL, MARCOS LOPEZ, and MILTON VALENCIA, Defendants-Appellants	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

BEFORE- MARTIN, Chief Judge; RYAN and COLE, Circuit Judges.

BOYCE F. MARTIN, JR., Chief Judge. There are five appellants in this case: Curtis McDonald, Alice Johnson, Jerlean McNeil, Marcos Lopez, and Milton Valencia. A Jury found McDonald, Johnson, and McNeil guilty of various charges arising from their involvement in a conspiracy to distribute cocaine. McDonald, Johnson, and McNeil seek to have their convictions set aside, alleging that no rational trier of fact could have decided their cases as the jury did. Alternately, they argue that the district court made several different procedural errors, and therefore they should have a

new trial.

Lopez and Valencia pled guilty to various, crimes arising from the same conspiracy to distribute cocaine. Lopez argues that the lower court's factual finding that he was not a "minor participant" under 3B1.2(b) of the United States Sentencing Guidelines was clearly erroneous, and therefore seeks to have his sentence vacated and remanded for resentencing. In Valencia's case, the lower court made a downward departure from the sentencing guidelines after the Government submitted a 5K1.1 motion in accordance with the United States Sentencing Guidelines, indicating that Valencia provided substantial assistance in the investigation and prosecution of the conspiracy. Valencia seeks to have his case remanded for resentencing contending that his sentence should have been further reduced.

We have gone to great lengths with the facts of this case to insure that some future court will not be as confused as we were when we started this case. As to the defendants who went to trial, the jury found that the Government presented sufficient evidence to demonstrate that McDonald, Johnson, McNeil, Lopez, and Valencia participated in a drug trafficking and money-laundering operation which transported cocaine from Houston, Texas and distributed it in Memphis, Tennessee, from 1991 until September, 1994. The jury found that McDonald and Johnson controlled the Memphis end of the conspiracy and directed the distribution of thousands of kilograms of cocaine, as well as controlling the shipment of

millions of dollars of drug proceeds back to Houston to the Colombians who controlled the source of the cocaine. The jury also found that McNeil operated a "stash house" where the conspirators stored hundreds of kilograms of cocaine and millions of dollars of cash, and that Valencia and Lopez worked as "mules," or drug couriers, for the conspiracy.

At trial, Ramone Ramirez, a contact of the Colombian Cali drug cartel who lived in Houston, testified that in 1991, he began sending "mules," including Valencia, to Memphis with shipments of cocaine. Valencia and another "mule" testified that an a number of occasions they made deliveries of between five and sixteen kilograms of cocaine to Johnson, and that on several occasions, McDonald gave Valencia and other "mules" between $250,000 and $500,000 in cash to be taken back to Ramirez and the other Colombians in Houston. Valencia testified that after making several bus trips between. Houston and Memphis, McDonald helped him purchase a Honda Accord to use for these trips. At trial, the Government produced a Tennessee vehicle registration which established that the car was purchased on May 24 and registered to a third party at Johnson's home address. Furthermore, Detective Larry Allen of the Shelby County Sheriffs Department, testified that on several occasions he observed this vehicle parked in front of Johnson's residence.

Valencia and Detective Allen also testified that on June 11, Johnson bought a brown Mercury Cougar and other "mules" indicated that the Cougar was modified to have

secret compartments to help transport the cocaine and money between Houston and Memphis.

Memphis hotel records reveal that Valencia and other "mules" made numerous telephone calls to Houston and to Johnson's residence in Memphis. Because of the increasing suspicion from the numerous hotel stays, Valencia testified that Ramirez spoke with Johnson about renting an apartment in which the "mules" could stay during their trips to Memphis. Lieutenant Keith Allen, with the Texas Department of Public Safety, testified that in July, Johnson rented an apartment in Memphis in her daughter's name for Valencia and the other "mules" to use.[1] One of the "mules" used the apartment's address when buying new tires for the Cougar.

Valencia testified that during the week of July 9, he and other "mules" flew to Memphis and delivered nine kilograms of cocaine to McDonald and Johnson. Upon their return to Houston, the police seized approximately $176,000 from Valencia and the others, which Valencia testified had been given to him by McDonald as payment for the cocaine. Officer Michael Gann of the Narcotics Task Force at the Houston International Airport testified that he found Johnson's address in the wallet of one of the "mules."

On August 4, Trooper Barry Washington of the Texas Department of Public Safety, stopped Valencia, who was driving

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[1]The lease agreement was introduced at trial in connection with Lieutenant Allen's testimony regarding the analysis of telephone records done by Texas law enforcement.

Johnson's Cougar. Trooper Washington seized approximately twelve kilograms of cocaine from a secret compartment in Johnson's Cougar, along with approximately $5,000. A search of the Cougar, registered to Johnson, found numerous documents containing Johnson's name and address.

In addition, analysis of the telephone subscriber records from one of Valencia's fellow "mules" cellular telephone and from the telephone at Johnson's apartment, showed numerous telephone calls between the "mule's" telephone and Johnson's telephone. In the personal belongings of one of the other "mules," the police found two business cards with the telephone number of Johnson's apartment.

Johnson was a factory worker for Kelloggs in Memphis. Tax returns introduced at trial showed Johnson reported her income for 1991 to be $15,753 and $20,163 for 1992. Johnson did not file tax returns in 1993 or 1994. She flied for personal bankruptcy in 1991 and her house on Queen Elizabeth Street was foreclosed on August 23, 1991. Yet, on September 27, Johnson purchased a new home in the name of her daughter at 5441 Fieldcrest. In addition to a $21,430 down payment on her new house, Johnson also made approximately $19,000 in cash down payments on three new cars from February 1992 until November 1992. The $21,430 down payment on the Fieldcrest home consisted of two cashier's checks in the amounts of $9,100 and $9,900, along with $2,430 in cash.

After the arrest of Valencia and the other "mules" in 1991, Ramirez took over the responsibility of shipping the cocaine to Memphis, Ramirez testified that the Columbian contacts flew to meet McDonald and Johnson. He further testified that during the next several months after the August 1991 seizure, he regularly

delivered approximately forty kilograms of cocaine to McDonald and Johnson and picked up $450,000 to $500,000. Ramierez testified that, in the spring, of 1992, he hired William Saa as a "mule" to transport the cocaine from Houston to Memphis. Saa testified that he made approximately five trips to Memphis, bringing approximately ten to twelve kilograms at a time.

Saa testified that on his first trip to Memphis, he met McDonald and Mose Williams, and unloaded the cocaine at Williams' house. Johnson then met them with $200,000, which they loaded into Saa's vehicle. Hotel records introduced at trial verified that Saa made a number of trips to Memphis during this time.

In October 1992, Saa testified that he quit driving loads of cocaine from Houston to Memphis, and that McDonald then hired Paul Duventre to deliver money to Houston and drive cocaine back to McNeil's house on Timothy Street in Memphis. Duventre testified that at McNeil's house, he and McDonald held the bags open while McNeil pulled out the kilos. Saa corroborated Duventre's testimony saying that he recalled meeting Duventre in Houston about four times and that Duventre delivered approximately ten kilograms of cocaine each time. Both Saa and Duventre recalled several trips to McNeil's house.

On September 30, McDonald's brother was stopped at the Memphis airport. He was flying round trip from Houston under an assumed name with a fifty-five minute return trip to Memphis. McDonald's brother was carrying $100,000. McDonald later claimed that the money came from gambling. However, a review of McDonald's tax returns from 1991 and 1992 show gambling losses equal to gambling winnings with a zero net income for these two years.

Saa and Duventre testified that in December 1992, McDonald asked Duventre to drive a load of money to Saa in Houston. Duventre testified that he drove the money to Saa in Houston and attempted to return to Memphis with nine kilograms of cocaine. However, the police apprehended Duventre during his return trip, and seized nine kilograms of cocaine and $159,000 from his vehicle. Telephone records from the time of the arrest show numerous telephone calls between telephones belonging to Johnson and to her Colombian contacts in Houston.

Ramirez testified that after the arrest of Saa and Duventre, Ramirez personally resumed slipping cocaine to Johnson and McDonald. He testified that between February and March 1993, he made several trips between Corpus Christi, Texas and Memphis, transporting between thirty and fifty kilograms of cocaine each time to Johnson and McDonald in exchange for $500,000 to $800,000 per shipment. Ramirez also testified that during this time, Johnson told him that she and McDonald were now regularly using McNeil's house as a "stash house" for the cocaine and money.

Ramirez's cellular telephone records during this time period, introduced at trial, showed roaming charges from Corpus Christi to Johnson's home telephone number in Memphis. Hotel records established rooms rented in the names of various relatives of Johnson and in the names of various "mules" who worked for Ramirez. Telephone records from these hotel stays, introduced at trial, show numerous calls from Houston to Johnson's home telephone in Memphis.

Ramirez testified that around April or May 1993, Ramirez received four hundred kilograms of cocaine from Colombia, and that from April to August 1993, Ramirez made trips directly to

McNeil's house, where McNeil, McDonald and Johnson were usually present, and where he would deliver cocaine or pickup money. One of McDonald's "mules" testified that he knew cocaine was coming to McNeil's house, and that he once received four kilograms of cocaine from McNeil at the instruction of McDonald.

Ramirez testified that in August 1993, he delivered fifty kilograms of cocaine to McDonald and received in exchange approximately $1,500,000. He further testified that McDonald immediately requested more cocaine and arranged to send his "mule," Williams, to Houston. Ramirez testified that Williams flew to Houston and called McDonald, who in turn called Ramirez to ask him to pick up Williams at the airport. Records introduced at trial show two collect calls on August 19 made from pay phones located in the Houston Hobby airport to McDonald's home. Law enforcement agents surveilling Ramirez on this date testified that they observed Ramirez pick up Williams at the airport. The agents followed Ramirez and Williams to Ramirez's "stash house," and then followed them outside the city where they stopped and searched them finding seventy-five kilograms of cocaine in their car.

Williams, faced with a long prison sentence, decided to help the agents by attempting a controlled delivery of the seventy-five kilograms of cocaine to Memphis. The agents agreed to let Williams alert his people in Memphis that the cocaine was on its way to avert any suspicion due to Williams' tardiness as a result of the stop and search outside of Houston. A tape-recorded call was placed to the telephone number subscribed to by McNeil. McNeil stated that "everybody was worried to death" because Williams was late, and that McDonald was looking for him.

On the way to Memphis, on August 20, agents observed counter-surveillance by McDonald and Johnson in a car which pulled alongside Williams' vehicle and then sped away after being tipped off by a hand signal that Williams was under police surveillance. Duventre testified that McDonald then called him and McNeil from his cellular telephone and told them that Williams was cooperating with the police and instructed Duventre and McNeil to leave McNeil's house. McDonald's cellular telephone records, introduced at trial, show roaming charges in Arkansas from McDonald's cellular telephone to Duventre, McNeil, and the homes of both McDonald and Johnson on the morning of August 20.

Williams delivered the cocaine to McNeil's house as planned. Unknown to the agents, McDonald and Johnson had tipped off McNeil, and she was not home. Later that day, the agents executed a search warrant at McNeil's house. During the search, a narcotics dog detected the odor of narcotics, in several places. Cocaine residue was also found in a bag taken from McNeil's closet and the agents seized address books containing the telephone numbers of Johnson and McDonald. Agents in Houston contemporaneously executed a search warrant at Ramirez's "stash house," where they found twenty-four kilograms of cocaine and approximately $1,006,000 in cash.

In approximately January 1993, Johnson recruited Maurice Mondie to distribute cocaine in Memphis. Mondie testified that from February to August, he regularly picked up approximately ten to fifteen shipments of cocaine from McNeil's house, averaging ten to fifty kilograms per shipment and delivered money in amounts ranging from $800,000 to $1,200,000. Mondie also testified that in August 1993, the morning Williams was to deliver

a shipment from Houston, Johnson telephoned him and told him not to go to McNeil's's house, because Williams had been arrested, and that the Police had seized seventy-five kilograms of cocaine and $1,500,000 in cash in Houston.

After Ramirez was arrested, Mondie testified that he continued to receive shipments of drugs from Houston from "Leo," a Colombian contact who assumed Ramirez's role after his arrest. Mondie testified that at the request of Johnson, he sent "mules" to Houston on five or six occasions. On December 11, police stopped one of the "mules" en route and seized $265,000. Telephone records from these dates introduced at trial show numerous calls between Mondie and Johnson.

On January 27, 1994, law enforcement agents arrested another one of Mondie's workers with three kilograms of cocaine. When police executed a search warrant of Mondie's apartment, they found five cellular telephones registered to false names. Police also found Western Union wire transfers to Houston, made by Mondie which contained a telephone number subscribed to by Johnson. They also found cocaine residue, $65,000, and a cellular telephone bill for a telephone number listed in McNeil's address book as belonging to Johnson. Again, the cellular telephone records introduced at trial showed numerous telephone calls between all the parties involved on these dates.

Mondie testified that by January 1994, "Leo" regularly sent his "mules" from Houston to Memphis, where they would contact Johnson who would refer them to Mondie or McDonald. Mondie further testified that "Leo" sent these shipments to Memphis approximately two times a month and averaged ten kilograms per shipment from January to September 1994.

One of "Leo's" "mules", Michael Barnes, testified that

"Leo" recruited Lopez to Work as a "mule" for him during this time. Barnes testified that "Leo" instructed Barnes to drive the cocaine to Memphis and check into a hotel and call Johnson's telephone number. Or the first two trips, Barnes testified that he and Lopez delivered the cocaine to Johnson and McDonald, and that on subsequent trips they delivered it to Mondie. Motel records introduced at trial showed calls from Barnes' room to Johnson's number. Telephone records also show numerous calls between the parties during Barnes' trips.

On April 27, police arrested Barnes and another "mule" in Arkansas with nine kilograms of cocaine. Barnes testified that at the direction of McDonald, he brought $200,000 from Memphis to Houston, and was to return with nine kilograms of cocaine. Police found on Barnes a business card with Johnson's telephone number written on it at the time of his arrest.

On September 13, a Louisiana State Trooper stopped one of "Leo's" "mules" oil the interstate and seized approximately ten kilograms of cocaine from her car. The "mule" agreed to cooperate with the police and make a controlled delivery to Johnson and McDonald. The police allowed the "mule" to make one recorded telephone call to her contact in Memphis, who was at Johnson's cellular telephone number. The "mule" told Johnson that she was going to check into a hotel in Memphis. After checking into the hotel, the police had the "mule" make another recorded telephone call to Johnson, giving her the telephone number at the hotel.

Early the following morning, at the same moment that the "mule" received a telephone call, McDonald and another individual arrived at the "mule's" hotel and circled her vehicle (containing the ten kilograms of cocaine). The other individual

then drove away in the "mule's" car, while McDonald followed him. Officers followed the two vehicles across town until the driver of the vehicle carrying the cocaine abandoned the vehicle and fled on foot, presumably because se lie detected the surveillance. The police arrested McDonald in his vehicle after driving half a block past the abandoned vehicle

A search of McDonald's vehicle revealed a piece of paper which contained the telephone number of the Holiday Inn and the "mule's" extension number, which the "mule" had relayed to Johnson during one of their tape recorded telephone conversations. The records of McDonald's cellular telephone, introduced at trial, show that he called the Holiday Inn at the exact moment his car pulled into the Holiday Inn parking lot.

Agents arrested Johnson that morning at her home and seized her cellular telephone. In addition to the toll analysis introduced at trial regarding specific transaction dates, summary charts were prepared from subpoenaed telephone records and introduced at arial showing all the calls made between cellular telephones, motel telephones, and long distance calls from residential telephones. A "global" summary chart, containing over 11,000 telephone calls from subpoenaed telephone records showed calls made between the parties throughout the conspiracy. Highlights from this chart showed over seven hundred telephone calls from Johnson's telephones to Ramirez's telephones four hundred and fifty calls from Johnson's telephones to "Leo's" telephones, seven hundred and forty calls from Johnson's telephones to Mondie's telephones; thirty-two calls from Valencia's telephone to Johnson's telephones, and eight hundred and seventy calls alone from one of McDonald's cellular telephones to Johnson's home telephone.

A grand jury indicted McDonald, Johnson, McNeil, Lopez and Valencia on November 20, 1994. At trial, a jury found McDonald guilty of the following offences: (1)conspiracy to possess with intent to distribute cocaine, (2) attempted possession of cocaine with intent to deliver; (3) three counts of attempted possession of cocaine writ intent to distribute; (4) conspiracy to commit money laundering; and (5)four counts of money laundering. At trial, a jury found Johnson guilty of the following offences: (1)conspiracy to possess with intent to distribute cocaine; (2)attempted possession of cocaine with intent to deliver-, (3)three counts of attempted possession of cocaine with intent to distribute; (4)conspiracy to commit money laundering; (5)money laundering; and during monetary transactions. At trial, a jury found McNeil guilty of the following offences: (1)conspiracy to possess with intent to distribute cocaine; (2)attempt. to possess with intent to distribute cocaine; (3)aiding and abetting; and (4)aiding and abetting money laundering.

The court sentenced McDonald and Johnson to life imprisonment, and McNeil to nineteen years and seven months imprisonment. They each timely filed appeals of their convictions.

Lopez and Valencia pled guilty. Lopez pled to conspiracy to possess with intent to distribute cocaine and conspiracy to commit money laundering, for which he was, sentenced to ten years and one month imprisonment. Valencia pled to conspiracy to possession with intent to distribute cocaine and conspiracy to commit money laundering, for which he received eight years and seven months. They each timely filed an appeal of their sentences.

McDonald, Johnson and McNeil contend that the Court should not uphold their convictions because the Government failed to produce sufficient evidence of (1)a single conspiracy; (2)a

conspiracy to possess cocaine with an intent to distribute; (3)an attempt to possess cocaine with the intent to distribute; (4)money laundering; and (5)a conspiracy to commit money laundering. The standard of review for claims of insufficient evidence is whether after viewing the evidence in the light most favorable to the prosecution: any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Lee*, 991 F.2d 343, 347 (6th Cir. 1993) (emphasis added). This Court stilted in *United States v. Ashworth*, 836 F.2d 260, 266 (6th Cir. 1988); that it does not sit as a "thirteenth juror" to judge the credibility of witnesses or to re-weigh the evidence.

The main thrust of McDonald, Johnson, and McNeil's argument for finding, insufficient of evidence is that the Government's witnesses lacked credibility. They argue that the Government's key witnesses, including Ramirez, Valencia, Lopez, Eames, and Mondie, had an incentive to lie to either avoid criminal prosecution themselves, or receive reduced sentences.

However, the jury had the opportunity to hear all the witnesses, including the impeachment evidence presented by the defense, and nonetheless chose to believe the Government's witnesses and convict McDonald, Johnson, and McNeil. In *United States v. Latouf*, 132 F.3d 320, 330 (6th Cir. 1997), this Court stated that it gives special deference to the jury's resolution of questions of credibility.

McDonald, Johnson, and McNeil each contend that the proof offered at trial failed to establish the existence of a single conspiracy. In *United States v. Ghazaleh*, 58 F.3d 240, 244-45 (6th Cir. 1995), this Court stated that "The issue of whether single or multiple conspiracies have been shown is usually a question of

fact to be resolved by the Jury . . . and it is to be considered on appeal in the light most favorable to the government." Furthermore, this Court held that "[I]t is often possible, most especially with drug conspiracies, to divide a single conspiracy into subagreements . . . This does not, however, mean that more than one conspiracy exists. The key is to determine whether the different subgroups are acting in furtherance of one overarching plan." *Id.*

The district court gave the Sixth Circuit's pattern jury instructions 3.08 and 3.09 regarding multiple conspiracies to the jury. The Jury heard the evidence and found a single conspiracy. The record suggests this conclusion.

For a conspiracy conviction pursuant to 21 U.S.C. § 846 to stand, this Court stated in *United States v. Elder*, 90 F.3d 1100, 1120 (6th Cir. 1996), that the Government must demonstrate the following elements (1) an agreement by two or more persons to violate the drug laws; and (2) the knowledge, intent and participation of each conspirator. No formal or express agreement is required and a tacit or mutual understanding among the parties is enough. *United States v. Phibbs*, 999 F.2d 1053, 1063 (6th Cir. 1993). Furthermore, a conspiracy may be inferred from circumstantial evidence that can reasonably be interpreted as participation in a common plan. *United States v. Ledezma*, 26 F.3d 636, 646 (6th Cir. 1994).

On the issue of "attempt," we stated, in *United States v. Pennyman*, 889 F.2d 104, 106 (6th Cir. 1989), that the Government must show: (1) the intent to engage in the proscribed activity and (2) the commission of an overt act which constitutes a substantial step toward the commission of the proscribed criminal activity. Moreover, "[c]ircumstantial evidence on its own can sustain a

jury's verdict. and such circumstantial evidence need not remove every reasonable possibility of doubt." *United States v. Avery*, 129 F.3 d 966, 971 (6th Cir. 1997).

During the course of the conspiracy, specific shipments of cocaine were seized by law enforcement officers and were not actually delivered to their Intended recipients. McDonald. Johnson. and McNeil. The fact that collateral acts. namely law enforcement's interception of the cocaine. prevented the conspirators from actually receiving the cocaine does not negate their subjective intent to possess. Furthermore. a defendant maybe found to have taken a "substantial step" for the purpose of attempt even though he failed to gain actual possession of the drugs. *Pennyman*, 889 F.2d at 107.

McDonald. Johnson. and McNeil offer brief, conclusory statements that the Government failed to prove the attempt counts. Absent any factual or legal basis to support the appellants arguments, we think the factual funding that hat appropriately rested with the jury should not be disturbed.

This Court stated in *United States v. Haun*, 90 F.3d 1096, 1100 (6th Cir. 1996), that to prove a violation of the money laundering statute, 18 U.S.C. § 1956(a)(1)(A)(i), the Government must show that the defendant: (1) conducted a financial transaction that involved the proceeds of an unlawful activity, (2) knew the property involved was the proceeds of an unlawful activity, and (3) intended to promote that unlawful activity.

Again, McDonald Johnson, and McNeil offer brief, conclusory statements to the effect that the Government's proof of money laundering, failed, They offer no to facts to warrant reversal.

This Court reviews the district court's evidentiary rulings

generally under an abuse of discretion standard. *United States v. Thomas*, 74 F.3d 676; 679 (6th Cir. 1996). Rulings as to hearsay evidence are reviewed *de novo*. *United States v. Johnson*, 71 F.3d 539. 4143 (6th Cir. 1995).

At trial, the Government introduced a tape recording of the telephone conversation between McNeil and Williams which occurred while Williams was attempting, at the behest of law enforcement officials, to make a controlled delivery of cocaine to McNeil's house. McDonald, Johnson, and McNeil contend that the recorded telephone conversation was admitted in violation of the hearsay rules. Specifically, they argue that the conversation does not fall within the "co-conspirator" exception to the hearsay rules because at the time of the conversation, Williams was a government informant, and therefore was not acting "during the course and in furtherance of the conspiracy" pursuant to Federal Rules of Evidence 801 (d)(2)(E).

However, the district court did not rule that the tape recorded conversation was non-hearsay because it was a statement of a coconspirator. Instead, the district court admitted the tape recorded conversation under two theories. First; the court admitted McNeil's half of the conversation pursuant to Federal Rule of Evidence 801(d)(2)(A), as an admission of a party opponent. Second, Williams' half of the conversation was admitted because it was not offered for its truth, but rather to give context to McNeil's statements. Therefore, it was not hearsay because it was not "offered into evidence to prove the truth of the matter asserted" under Federal 'Rule of Evidence 801(c). This Court has held that out-of-court statements not offered for their truth are not hearsay, and that their admission does not violate the hearsay rule. *United States v. Johnson*, 71 F.3d 539, 543 (6th Cir. 1995).

Although this Court has not decided a case on point, other circuits have held that, in the context of tape-recorded conversations between a criminal defendant and an informant, the informant's side of the conversation, when offered to make the defendant's statements intelligible as an admission and to place them in context, is admissible as nonhearsay. Furthermore, the defendant's statements in the tape-recorded conversation constitute nonhearsay admissions of a party. *See United States v. Sorrentino*, 72 F.3d 294, 298 (2d Cir. 1995); *United States v. Cantano*, 65 F.3d 219, 225 (1st Cir. 1995); *United States v. Cheramie*, 51 F.3d 538, 540 (5th Cir. 1995); *United States v. Rollins*, 862 F.2d 1282, 1296 (7th Cir. 1989); *United States v. Jordan*, 810 F.2d 262, 264 (D.C. Cir. 1987); *United States v. Whitman*, 771 F.2d 1348, 13 51 (9th Cir. 1985). Because Williams' statements were not offered for their truth, but merely to give meaning to McNeil's statements and place them in context, they do not violate the hearsay rule.

McDonald, Johnson, and McNeil further contend that the admission of Williams' taperecorded statement violated their Sixth Amendment right to confront the witnesses against them. However, when an out of court statement is not offered to prove the truth of the matter asserted, tile confrontation clause is not implicated. *Tennessee v. Street*, 471 U.S. 409, 413 (1985); *United States v. Martin*, 897 F.2d 1368) 1372 (6th Cir. 1990).

The prosecution used a photographic display of the appellants to help witnesses identify the appellants as they prepared for trial. McDonald and McNeil argue that in-court identifications based on the out-of-court photographic display identifications are tainted because the prosecution did not disclose that it was using the photographic display to aid the witnesses' identifications of the appellants.

Photographic displays are not subject to the right to counsel to be present, *United States v. Wade*, 388 U.S. 218, 226-27 (1967), but they may be subject to suppression if they are overly suggestive or unfair under *Simmons v. United States*, 390 U. S. 377, 383 (1968). McDonald and McNeil assert that they were unable to move pre-trial for the suppression of the photographic displays because the prosecution did not disclose the existence of the displays before the trial began.

The Government contends that the allegation that the photographic displays were not available pre-trial is false. They assert that McDonald and Johnson made no formal written request for Rule 16 discovery and that did request discovery, which the Government responded to by disclosing that McNeil had been identified by use of a photographic display. Furthermore, the Government asserts that they made all items of discovery available for photocopying and inspection pursuant to Rule 16.

The district court, upon agreement of all the parties, set up a two-week period during which the Government made all evidence available for inspection at the Drug Enforcement Agency office in Memphis. The Government says that during this time, counsel for McDonald, Johnson, and McNeil reviewed the discovery, including the photographic displays. In addition, the Government described the discovery process, including a mention of the photographic displays, during a pre-trial hearing on April 17, 1995.

Counsel for McNeil agreed at trial that the photographic displays were included in discovery and the district court made a finding that, the Government had complied with Rule 16 by providing the photographic displays in discovery. It appears that the photographic displays were available during discovery and that

appellants counsel had knowledge of the displays.

McDonald, Johnson, and McNeil all claim that the district court improperly excused Juror Culpepper and that as a result they are entitled to a new trial. During the trial, Juror Culpepper sent a note to the judge indicating that she had just realized that she was a social acquaintance of Johnson's niece and nephew. Juror Culpepper also stated that she had made the other jurors aware of her connection to Johnson. The district court decided to remove Juror Culpepper and replace her with an alternate juror based on these factors, and because Juror Culpepper, who was eight months pregnant at the time, had appeared to be dozing during testimony.

This Court held, in *United States v. Warren*, 973 F.2d 1304, 1308 (6th Cir. 1992), that "the substitution of an alternate for a juror for reasonable cause is within the reasonable prerogative of the trial court and does not require the consent of any party. A party claiming to be injured by such an action is entitled to a new trial only upon a clear showing of prejudice to him." While this Court has not ruled in a case precisely on point, other circuits have held that both sleeping during testimony, *United States v. Smith*, 550 F.3 d 277, 285 (5th Cir, 1977), and having a remote social relationship with the defendant, *United States v. Campbell*, 845 F.2d 782, 786 (8th Cir. 1983), are reasonable grounds for removal of a Juror within the prerogative of the trial court.

This Court further held that it will not presume that the appellant is prejudiced because a juror was dismissed, absent a plain showing of such prejudice. *United States v. Smith*, 550 F.3d at 285. Neither McDonald, Johnson, nor McNeil have indicated how the removal of Juror Culpepper prejudiced them.

The district court record shows that during McNeil's case

in chief defense counsel considered calling David McGriff, a law enforcement officer, as a witness to testify to prior inconsistent statements and omissions that witness Duventre made to McGriff. During a bench conference, the court stated that, defense counsel was able to inquire into the inconsistencies and omissions, but that if he did so, it would open the door for the Government to offer prior consistent statements which Duventre made before an improper influence or motive to fabricate arose, under *Torre v. United* U.S. 15 0, 156 (1995). Based on this, defense counsel chose not to call McGriff. McNeil argues that the district court's decision to allow re-direct on prior consistent statements if defense counsel "opened the door" was improper.

In *Tome*, the Supreme Court held that a declarant's consistent out-of-court statements may be admitted into evidence in order to rebut a charge of recent fabrication, improper influence, or Motive only if the out-of-court statements were made prior to the alleged recent fabrication or improper influence or motive, 513 U.S. at 156. There is nothing in the record to indicate that the district court's decision to allow the Government to rehabilitate McGriff by showing Duventre's prior consistent statements made before an improper influence or motive to fabricate arose, it defense counsel opened the door by inquiring as to Duventre prior inconsistent Statements and omissions is at odds with the Supreme Court's decision in *Tome*.

We generally apply the clearly erroneous standard to factual findings made in consideration of a Motion to Suppress evidence. However, the district court's legal conclusions, such as a finding of probable cause, are reviewed *de novo*. *United States v. Padro*, 52 F.3d 120, 122 (6th Cir. 1995).

On February 9, 1995, McDonald filed a Motion to

Suppress evidence which was seized during a search of his car that accompanied his arrest. He alleged that the warrantless seizure of his person and automobile violated of the Fourth Amendment. After a hearing, a United States Magistrate recommended a denial of the Motion to Suppress. The district court reviewed the magistrate's decision *de novo* and also entered an Order Denying the Motion to Suppress.

In *Smith v. Thornburg*, 136 F 3d 1070, 1074 (6th Cir. 1998), this Court held that pursuant to the automobile exception to the warrant requirement, an officer may search a readily mobile vehicle without a warrant if he has probable cause to believe the vehicle contains evidence of a crime. Furthermore, the warrantless arrest of a suspect does not violate the Fourth Amendment if the arresting officer has probable cause to believe that the suspect has violated or is violating the law. *Michigan v. DeFillippo*, 443. U.S. 31, 36 (1979).

The Supreme Court defines "probable cause" as "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstance shown, that a suspect has committed, is committing, or is about to commit an offense." Id at 3 7. This Court held in *Padro*, 53 F.3d at 123, that "Determinations of probable cause are based on a totality of the circumstances, and involve a practical, common sense review of the facts available to the officer at the time of the search."

At the time of the warrantless search and seizure of McDonald's automobile and person, a "mule," who was stopped on her way to Memphis with ten kilograms of cocaine in her car, had agreed to make a controlled delivery of cocaine to McDonald and Johnson. The "mule" identified McDonald and Johnson in

photographs as the people to whom she had delivered cocaine in the Past. The "mule," called Johnson and gave her the number of the hotel room in which she was staying.

Subsequently, McDonald and a passenger showed up at the hotel. The passenger exited McDonald's car and drove away in the "mule's" car, which still held the ten kilograms of cocaine, followed closely by McDonald. McDonald followed the car across town, until the surveillance was detected, and the driver fled the vehicle containing the cocaine on foot. Law enforcement officials arrested McDonald in his vehicle immediately after he, drove past the abandoned vehicle. They then searched McDonald's vehicle.

In light of the totality of the circumstances, we think there are sufficient facts of adequate cause which support the search and seizure of McDonald's person and vehicle. Thus the district court appropriately admitted the evidence obtained from those searches.

At trial, the court allowed Ramirez to testify that after the thirty kilograms of cocaine had been stolen from McDonald and Johnson, they asked Ramirez whether he knew someone who would kill the person who stole the cocaine. McDonald and Johnson objected to this testimony, arguing that its prejudicial effect outweighed its probative value under Federal Rule of Evidence 1103.

The Government argued that the testimony was more probative than prejudicial because it demonstrated McDonald and Johnson's involvement 'in the conspiracy, established one of the reasons for Ramirez's growing debt to the Colombians, he was not paid for the stolen cocaine, and evidenced another meeting between Ramirez and McDonald and Johnson which established a basis for Ramirez's identification of McDonald and Johnson. The district court, in its discretion, accepted the Government's

argument and admitted the testimony upon a finding that it was more probative than prejudicial. We agree.

In *United States v. Sander*, 95 F.3d. 449, 453 (6th Cir. 1996), this Court held that "Evidence that is prejudicial only in the sense that it paints the defendant in a bad light is not unfairly prejudicial pursuant to Rule 403."

McDonald and Johnson also argue that they were not allowed to cross-examine Duventre about being an ordained minister. However, the trial record shows that defense counsel brought out the fact that Duventre was an ordained minister on cross-examination. Defense counsel then sought to establish that Duventre was, in fact, not an ordained minister. The district court disallowed further questioning as to whether Duventre was an ordained minister upon a finding that this line of questioning was extrinsic and collateral.

Federal Rule of Evidence 608(b) states that "specific instances of conduct of a witness . . .for the purpose of attacking or supporting the witness' credibility . . .may not be proved by extrinsic evidence " In *United States v. Obiukwu*, 17 F." 3 d 8 16, 821 (6th Cir. 1994), this Court held that "trial judges retain wide discretion to impose reasonable limit's on interrogation that is repetitive or only marginally relevant." Further questioning was irrelevant and the district court did not abuse its discretion in limiting the cross-examination.

We next consider the Motion to Recuse the trial Judge. We review a lower court's denial of a Motion to Recuse for abuse of discretion. *Wheeler v. The Southland Corp.*, 875 F.2d 1246, 1252 (6th Cir. 1989). McDonald and Johnson contend that the trial judge erred in failing to recuse herself from this case because her husband was in the same law firm as an attorney who had

represented Johnson in an unrelated civil matter.

Title 28 U.S.C. 455 states that a district judge is required to recuse himself only if a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might be reasonably questioned." This Court has held That "the [29 U.S.C. § 455] standard is objective and not based an the subjective view of a party." *United States v. Dandy*, 998 F.2d 1344, 1349 (6th Cir. 1993). *See also, United States v. Hurst*, 951 F.2d 1496 (6th Cir. 1991) (Upholding refusal of a trial judge to recuse himself when he earlier, as a private attorney, had filed a law suit against defendant).

The law firm was not involved in the present action, and there was no way that the judge could have financially benefitted from the law firm's representation of Johnson, due to the law firm's fee structuring arrangement. Thus, there was no error in declining to recuse.

McDonald and Johnson allege that the trial court erred in overruling their hearsay objections on approximately fifteen different occasions. However, their briefs contain no discussion as to the factual basis upon which the objections were raised nor do they attempt any legal discussion to support their argument. Because McDonald and Johnson averred to these issues in a perfunctory manner, we deem them waived.

McDonald claims that the trial transcript is not complete because he has not been provided with, (1) a transcript of audio recordings played at trial, and (2) a transcript of "Spanish language conversations" between Spanish speaking witnesses and their

interpreter.[2] Neither claim appears to have merit.

The Court Reporter's Manual Chapter XVIII. Part C. provides that audio recordings played at trial are not to be transcribed. Instead, they are entered as exhibits end made part of the record on appeal. The audio tape played at trial is part of the record on appeal.

In addition, the testimony of Spanish speaking witnesses was translated by an interpreter and transcribed by the court reporter in English. The court reporter was not required to transcribe in Spanish. McDonald has cited no authority to support his position that the court reporter was required to transcribe Spanish conversations between the witness and interpreter, nor does any such authority appear to exist. Therefore, this Court denies McDonald's request for a transcript of the "Spanish language conversations" between the Spanish speaking witnesses and the interpreter, in keeping with this Court's June 25, 1998 Order to that effect.

McDonald, Johnson, and McNeil also argues the recent Tenth Circuit decision in *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), *reh'g en banc granted, opinion vacated* (July 10,

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[2]On March 17, 1998, McDonald filed a motion for this Court to require the court reporter to prepare an entire trial transcript, including Spanish language conversations, and /or allow a supplemental brief on this issue to be prepared. This Court entered an order on June 25, 1998, denying the substance of McDonald's argument but granting his request to file a supplemental brief on this issue. On August 6, 1998, both McDonald and Johnson filed a supplemental brief. Johnson will not be included in the supplemental brief, as she was not a party to original motion.

1998). Specifically they ask that their sentences be overturned, or in the alternative that they be granted new trials in which the testimony of witnesses who cooperated with the Government in exchange for leniency be excluded.

In *Singleton*, a three judge panel of the Tenth Circuit ruled that the government had violated 18 U.S.C. § 201 (c)(2), the federal witness tampering statute, by promising leniency to a witness in return for his testimony against a defendant. The Singleton decision was entered by a three-judge panel on July 1, 1998. On July 10, the Tenth Circuit vacated the panel's July 1 decision and scheduled the case for rehearing en bane.

The Sixth Circuit is disinclined to accept the position of the *Singleton* panel. This Court will address the *Singleton* issue in the forthcoming, opinion, *United States v. Ware*, Case No. 97-5771. In *Ware*, this Court holds that "even if we could make the great leap necessary to include prosecuting attorneys within the scope of § 201(c)(2), we would not apply the exclusionary rule to suppress the testimony of cooperating accomplices."

The district court's findings of fact regarding whether a defendant is entitled to a "minor participant" sentence reduction under § 3B1.2(b) of the United States Sentencing Guidelines, is reviewed for clear error. *United States v. Moss*, 9 F.3d 543, 554 (6th Cir. 1993). McNeil and Lopez were sentenced to nineteen years and seven months and ten years and one month of prison, respectively, for their involvement in the conspiracy. Both McNeil and Lopez assert that they qualified for the "minor participant" sentence reduction and ask that their cases be remanded for resentencing.

The defendant must prove by a preponderance of the evidence that he is entitled to a sentence reduction under §

3B1.2(b). Id. The record reflects that McNeil did not carry This burden. Although McNeil alleges that she was only a "very, very passive participant," she did allow her house to be used as a distribution point for hundreds of kilograms of cocaine and millions of dollars for an eight month time period. Therefore the district court's determination that McNeil was not a "minor participant" is not clearly erroneous.

Lopez was involved as a "mule" in the conspiracy from early 1993 to April, 1994. He indicated that he made between six and eight trips between Memphis and Houston, transporting between ten and fifteen kilograms of cocaine each trip. The probation officer who prepared Lopez's pre-sentencing report found that there was no information that would warrant a departure from the prescribed guideline range, absent a 5K1.1 motion by the Government indicating that Lopez provided substantial assistance in the investigation and prosecution of the conspiracy. Therefore, the district court's determination that Lopez was not a "minor participant" is not clearly erroneous.

Valencia argues that the district court's sentence is excessive and that the trial judge should have departed further from the sentencing guidelines after the Government made its § 5K1.1 motion stating that Valencia provided substantial assistance in the investigation and prosecution of the conspiracy.

This Court has repeatedly held that it has no jurisdiction over appeals contesting the extent of downward departures made pursuant to § 5k 1.1. *See,., e.g., United States v. Neshitt*, 90 F.3d 164, 166 (611 Cir. 1996). Therefore, the amount of downward departure the district court granted in this case is not subject to review by this Court.

None of the. issues brought by McDonald, Johnson

McNeil. Lopez or Valencia on appeal are meritorious and thus the judgment as to each is affirmed.

Judge Ryan concurs in the judgment of affirmance only.

97-5339/5556

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	
CURTIS MCDONALD (97-5339);	)	ORDER
ALICE MARIE JOHNSON (97-5556),	)	
Defendants-Appellants.		

BEFORE: MARTIN, Chief Judge; RYAN and COLE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

AMENDMENT V
CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

97-5339/5556

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	
CURTIS MCDONALD (97-5339);	)	ORDER
ALICE MARIE JOHNSON (97-5556),	)	
Defendants-Appellants.		

Before: KEITH, BATCHELDER and COLE, Circuit Judges.

The defendants appeal their convictions and sentences on charges of conspiracy to possess with intent to distribute cocaine and other related offenses. They now jointly move to remand their cases to the district court based on the decision in *United States v. Singleton*, 144 F. 3d 13 43 (10th Cir. 1998). The government has filed a response in opposition.

In *Singleton*, the court ruled that the government had violated 18 U.S.C. § 201(c)(2) by promising leniency to a witness in return for his testimony against the defendant. According to the defendants, similar promises of leniency were made to government witnesses who testified against them at trial. The *Singleton* decision was entered by a three judge panel an July 1, 1998. On July 10, 1998, the Tenth Circuit vacated the panty's July 1 decision and scheduled the case for rehearing en banc. In view of this development, we conclude a remand is not warranted at this time.

It is ORDERED that the joint Motion to remand is denied. Within a time period to be established by the clerk the defendants

shall each file a supplemental brief, not to exceed five pages, addressing the issues raised by the *Singleton* decision. The government may file a supplemental brief in response, limited to the own number of pages.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Section 201. Bribery of public officials and witness

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(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom;

(3) directly or indirectly, demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon any such trial, hearing, or other proceeding, or for or because of such person's absence therefrom;

shall be fined under this title or imprisoned for not more than two years or both.